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FILED

DISTRICT COURT OF GUAM

MAR 14 2006 9P

MARY L.M. MORAN

CLERK OF COURT

**IN THE DISTRICT COURT OF GUAM
HAGÁTÑA, GUAM**

JULIE BABAUTA SANTOS, individually)
and on behalf of all those similarly)
situated,)

Petitioner,)

vs.)

FELIX P. CAMACHO, Governor of Guam;)
ART ILAGAN, Director of Department of)
Revenue and Taxation; LOURDES M.)
PEREZ, Director of Department of)
Administration; DOUGLAS B. MOYLAN,)
Attorney General of Guam; and)
GOVERNMENT OF GUAM,)

Respondents.)

Civil Case No. 04-00006

**MOTION TO CERTIFY QUESTION
FOR INTERLOCUTORY APPEAL**

The Attorney General of Guam, by virtue of his democratically elected status as the People of Guam's (Government of Guam's) counsel and a respondent in this matter, respectfully moves this Honorable Court to certify this important question for interlocutory appeal pursuant to Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) (3) of the

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Motion to Certify Question for Interlocutory Appeal

District Court of Guam Case Number 04-00006

1 Federal Rules of Appellate Procedure to the Ninth Circuit Court of Appeals. This request
2 is respectfully submitted in the event that this Court is disinclined to reconsider its March
3 10, 2006 order, as requested in the separately filed Motion.

4
5 **Certification for Interlocutory Appeal Appropriate.**

6 Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) (3) of the Federal Rules of Appellate
7 Procedure, the Attorney General of Guam respectfully submits that (1) the “order involves
8 a controlling question of law”; (2) there is “substantial ground for difference of opinion”;
9 and (3) “an immediate appeal from the order may materially advance the ultimate
10 termination of the litigation.” See 28 U.S.C. § 1292(b).

11
12 Specifically, the Attorney General of Guam moves this Honorable Court to certify an
13 interlocutory appeal to the Ninth Circuit Court of Appeals for the following question:

14 *Whether the Attorney General of Guam may be disqualified from*
15 *representing the Government of Guam (People of Guam) in tax*
16 *litigation cases when his opinion varies from that of the Governor of*
17 *Guam.*

18 Interlocutory appeal by permission is governed by 28 U.S.C. § 1292(b), which
19 provides in full:

20 When a district judge, in making in a civil action an order not
21 otherwise appealable under this section, shall be of the opinion that
22 such order involves a controlling question of law as to which there is
23 substantial ground for difference of opinion and that an immediate
24 appeal from the order may materially advance the ultimate
25 termination of the litigation, he shall so state in writing in such order.
The Court of Appeals which would have jurisdiction of an appeal of
such action may thereupon, in its discretion, permit an appeal to be
taken from such order, if application is made to it within ten days
after the entry of the order: Provided, however, That application for
an appeal hereunder shall not stay proceedings in the district court

1 unless the district judge or the Court of Appeals or a judge thereof
2 shall so order.

3 The standards governing the grant or denial of interlocutory appeal by permission
4 are well-defined. As noted by the District Court for the District Court of Oregon:

5 Pursuant to 28 USC § 1291, the federal courts of appeals postpone
6 appellate review until after a final judgment has been entered by a
7 district court. The Interlocutory Appeals Act, 28 USC § 1292(b) ("§
8 1292(b)"), provides a limited exception to this final judgment rule. It
9 authorizes district courts to certify an order for interlocutory appeal
10 only if: (1) the "order involves a controlling question of law;" (2) there
11 is "substantial ground for difference of opinion;" and (3) "an
immediate appeal from the order may materially advance the
ultimate termination of the litigation." *Id*; *In re Cement Antitrust*
Litig., 673 F.2d 1020, 1026 (9th Cir1982), *aff'd sub nom Arizona v.*
Ash Grove Cement Co., 459 U.S. 1190, 103 S.Ct. 1173, 75 L.Ed.2d 425
(1983).

12 *Marsall v. City of Portland*, not reported in F.Supp.2d, 2004 WL 1774532 (D.Or. 2004)
13 (Stewart, Magistrate J.) (Footnote omitted).

14 The criteria for interlocutory appeal are easily established in this case. Indeed, in
15 footnote 8 of the March 20, 2006 Order, at page 12 this Honorable Court clearly invites
16 certification of this issue by stating the following:

17 The court is mindful that until this matter is finally determined, the
18 issue will be revisited to potentially bog down the progress of this as
19 well as other cases. Accordingly, the court notes the possibility of a
motion to certify the issue as to the representation of the
"Government of Guam" to the Ninth Circuit for interlocutory appeal.

20 The closest analogy to what this Court has effectively done in authorizing the Governor and
21 his representatives to retain their own counsel over the objection of the Attorney General is
22 disqualify the Attorney General, and "Chief Legal Officer of the Government of Guam," 48
23 U.S.C. § 1421g(d)(1), from representing his own clients. Ordinarily, an order disqualifying
24 counsel is not an appealable order as of right. *In re: Grand Jury Investigation*, 182 F.3d
25

1 668, 670 (9th Cir. 1999). And while the Attorney General has his doubts whether his
2 disqualification from representing the Governor and his representatives would not satisfy
3 the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541
4 (1949), given the Attorney General's assertion that the right to control this litigation and
5 represent the respondents belongs not to the respondents, but to the Attorney General
6 under the Organic Act, the Attorney General, indeed, the Public, need not wait until the
7 conclusion of this litigation to appeal the issue. As noted by the United States Supreme
8 Court:

9
10 Moreover, a rule precluding appeals pursuant to § 1291 would not
11 necessarily leave the client or the disqualified attorney without a
12 remedy. As we noted in *Firestone [Tire & Rubber Co. v. Risjord]*, 449
13 U.S. 368, 101 S.Ct. 669 (1981), "a party may seek to have the question
14 certified for interlocutory appellate review pursuant to 28 U.S.C. §
15 1292(b) ... and, in the exceptional circumstances for which it was
16 designed, a writ of mandamus from the court of appeals might be
17 available." 449 U.S., at 378-379, n. 13, 101 S.Ct. at 675-676, n. 13.

18 *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 435 (1985).

19 Because this is an extraordinary case involving the interpretation and application of
20 the Organic Act of Guam, to an issue that is wholly collateral to the merits, but which is
21 critical to its ultimate disposition, mandamus may very well be an appropriate remedy.
22 However, the Attorney General respectfully submits that, in these circumstances,
23 certification for interlocutory appeal is the more appropriate remedy. *Cf.*, *Christenson v.*
24 *United States District Court for the Central District of California*, 844 F.2d 694 n. 4 (9th
25 Cir. 1988).

1 **A. The Order Involves a Controlling Question of Law.**

2 A “question of law” is “controlling” under § 1292(b) if resolving it on appeal could
3 materially affect the outcome of litigation in the district court. *In re Cement Antitrust*
4 *Litig.*, 673 F.2d at 1026, a “question of law” means a “pure question of law,” not a mixed
5 question of law and fact or an application of law to a particular set of facts. *See*
6 *Ahrenholz v. Board of Trustees of the Univ. of Illinois*, 219 F.3d 674, 675-77 (7th Cir
7 2000). Writing for the Seventh Circuit Court of Appeals, Chief Judge Posner explained
8 that in the context of § 1292(b), the term “‘question of law’ means an abstract legal issue
9 rather than an issue of whether summary judgment should be granted.” *Id* at 677
10 (emphasis added).

11
12 In keeping with the congressional directive that § 1292(b) be applied narrowly and
13 only in exceptional circumstances, numerous other Federal courts also have interpreted
14 the phrase “question of law” to mean a pure legal issue. *Ahrenholz, Id.* at 676.

15 The question presented here, namely: [W]ho is the attorney for the Government of
16 Guam and who controls litigation, is, of course, a pure legal issue. The Attorney General
17 believes that the U.S. Congress mandated that he represent the legal interests of the
18 People by virtue of the passage of 48 U.S.C. § 1421(g)(d)(1). Indeed, it is collateral to the
19 merits of whether or not the petitioner and the putative class are entitled to the relief they
20 seek in this Honorable Court. There are no facts in dispute. The question of who controls
21 the litigation and who are the lawyers qualified to appear before this Honorable Court is
22 without question a controlling issue, and an important issue to conserve judicial and the
23 parties’ resources.
24
25

1 It is the first question any court must ask. The first criteria – whether the order
2 presents a controlling issue of law -- is thus easily established.

3 **B. There is Substantial Ground for Difference of Opinion.**

4 To demonstrate “a substantial ground for difference of opinion” on a question for
5 § 1292(b) certification, a party must show more than its own disagreement with a court's
6 ruling. See, e.g., *First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116 (D.D.C.1996)
7 (“Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss
8 does not establish a ‘substantial ground for difference of opinion’ sufficient to satisfy the
9 statutory requirements for an interlocutory appeal”). However, “in determining
10 whether a substantial ground for difference of opinion truly exists, a district court must
11 analyze the strength of the arguments in opposition to the challenged ruling.” *Ryan,*
12 *Beck & Co., LLC*, 275 F Supp2d at 398 (internal quotation omitted). Indeed, an issue
13 can be a controlling question of law for which there is a substantial ground for difference
14 of opinion when it is “difficult and of first impression.” *Klinghoffer v. S.N.C. Achille*
15 *Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*,
16 921 F.2d 21, 25 (2nd Cir1990); but see *In re Flor*, 79 F.3d 281, 284 (2nd Cir1996)
17 (“[T]he mere presence of a disputed issue that is a question of first impression, standing
18 alone, is insufficient to demonstrate a substantial ground for difference of opinion.
19 Rather, [i]t is the duty of the district judge . . . to analyze the strength of the arguments
20 in opposition to the challenged ruling when deciding whether the issue for appeal is
21 truly one on which there is a substantial ground for dispute” (internal citations and
22 quotations omitted), *Marsall v. City of Portland*, *Supra* at page 5 (editorial brackets and
23 ellipses in original).

1 This is no mere disagreement, even vehement disagreement, with the Court's
2 ruling. Moreover, this is no mere dispute between adverse parties to the litigation,
3 between plaintiff and defendant, or petitioner and respondent, as is true in the ordinary
4 case, and even the usual disqualification cases. This dispute is within one set of the parties
5 – the respondents – themselves, as to who their lawyer is and what legal policy decisions
6 are to be made on their behalf.

7 The decision of this Court disqualifying the People's first democratically elected
8 "*Chief Legal Officer of the Government of Guam*" from representing his own clients, as
9 envisioned by Congress, and as evidenced by the substantial briefing in this case
10 demonstrates substantial grounds for a difference of opinion with respect to this dispute.
11 Note 48 U.S.C. § 1421(g)(d)(1). This Court and the parties have already expended
12 considerable time and resources in pursuit of a judicial resolution of this dispute. The
13 arguments presented are by no means frivolous; and no party would presume to suggest
14 otherwise. It is a question of first impression on Guam, although not unique to other
15 jurisdictions, which is reasonably foreseeable considering the recent creation of a
16 Constitutional and democratically elected Attorney General.

18 This Court has been asked to ascertain Congressional intent, and to make
19 inferences from Congressional silence. The Court has had to grapple with an intra-Organic
20 conflict that will ultimately define the balance of powers within the Executive Branch of the
21 Government of Guam, in all future tax refund cases, and possibly in many other types of
22 cases, civil and criminal, that will be heard before this Court; and the Court has been
23 favored with case law from numerous jurisdictions which present different answers to the
24 question presented. The dispute is substantial.

1 **C. An Immediate Appeal from the Order May Materially Advance**
2 **the Ultimate Termination of the Litigation.**

3 Unquestionably, an interlocutory order will materially advance the ultimate
4 termination of this litigation as well as the issue in future litigation. Indeed, the litigation
5 has been materially delayed, and a settlement of this case disrupted because of this
6 collateral dispute. If an interlocutory appeal is certified and the Attorney General
7 ultimately prevails, the Plaintiff class and anticipated objectors will only have attorney and
8 one legal position for the whole of the Government of Guam to contend with. If an appeal
9 is not certified, any progress made throughout the case -- whether the petitioners prevail in
10 whole or in part or not -- will be held in abeyance pending final resolution by the Court of
11 Appeals of what is actually a preliminary question: [W]ho is the lawyer for the
12 respondents and who controls the litigation? If the Attorney General is ultimately
13 successful in his position, all the Court's and the parties' time and energies to-date will
14 have been wasted.

15
16 **D. This Case Presents Extraordinary Circumstances.**

17 This case involves the construction of Congressional intent in amending Guam's
18 Organic Act in 1998, establishing the Office of Attorney General, designated by Congress
19 as the "Chief Legal Officer for the Government of Guam." 48 U.S.C. § 1421g(d)(1). It is
20 no ordinary case wherein an attorney is disqualified because of an ethical or other
21 conflict. It presents a possible conflict within the Organic Act itself with respect to the
22 doctrine of separation of powers and the balance of powers that the Attorney General of
23 Guam was created to ensure. The question presented directly impacts Guam's self-
24 governance, as authorized only by Congress, and the allocation and delegation of
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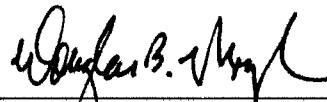
1 powers, duties and responsibilities not merely *between* the three branches of
2 government for the Territory of Guam – executive, judicial and legislative – but *within*
3 the branches of government itself, namely, the Executive Branch. The Attorney
4 General respectfully submits that the Court’s order is contrary not only to
5 Congressional intent in establishing the Office of Attorney General within the Organic
6 Act independent of legislative and gubernatorial oversight and control, but undermines
7 democratic principles of self-governance with respect to the People of Guam’s choice of
8 their Chief Legal Counsel for all the Government of Guam. For that reason, an
9 interlocutory appeal is appropriate for certification.
10

11
12 **Conclusion.**

13 For the foregoing reasons, the undersigned elected Attorney General of Guam
14 requests that this Honorable Court certify the issue of the Attorney General of Guam’s
15 disqualification in this case to the Ninth Circuit Court of Appeals.

16 Respectfully submitted this 14th day of March, 2006.

17 **OFFICE OF THE ATTORNEY GENERAL**
18 **Douglas B. Moylan, Attorney General of Guam**

19 

20 **DOUGLAS B. MOYLAN**
21 Attorney General of Guam, Elected
22
23
24
25

1 **CERTIFICATE OF SERVICE**

2 This is to certify that I have this day caused to be served counsel for the opposing
3 party(ies) with a copy of the foregoing by hand delivery, or by first class properly
4 addressed, to:

5 Michael Phillips, Esq.
6 Phillips & Bordallo, P.C.
7 410 West O'Brien Dr.
Hagåtña, Guam 96910

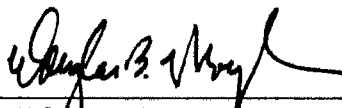
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18 Respectfully submitted this 13th day of March, 2006.

19 **OFFICE OF THE ATTORNEY GENERAL**
20 Douglas B. Moylan, Attorney General of Guam

21 

22 **DOUGLAS B. MOYLAN**
23 Attorney General of Guam, Elected
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